United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

77-1018

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

B/s

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

MICHAEL PATRICK BARRETT and
FERDINAND SANTANA,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK.

BRIEF OF APPELLEE

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INDEX.

TABLE OF CASES.

STATUTE.

RULES.

IN THE

United States Court of Appeals

For the Second Circuit

Docket No. 77-1081

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

MICHAEL PATRICK BARRETT and
FERDINAND SANTANA,
Defendants-Appellants.

On appeal from the United States District Court
for the Western District of New York

Statement of the Case

On June 24, 1976 the appellants along with Joseph Charles Ferraro, who is not involved in this appeal,[1] were indicted for

[1] On March 21, 1977, the day he was sentenced, Ferraro filed a Notice of Appeal. Joseph Carlisi, Esq., counsel for Ferraro informed this Assistant United States Attorney on April 8, 1977 that he did not intend to pursue the appeal.

The delay in his sentence was attributable to the fact that he made some well reasoned motions for judgment of acquittal and for a new trial pursuant to Rules 29 and 33 of the Federal Rules of Criminal Procedure. The first two issues raised here, namely, the prejudicial effect of adverse newspaper publicity and the propriety of the trial Court's re-charge relating to circumstantial evidence were decided against Ferraro by Decision and Order of the trial judge, Hon. John T. Curtin, on March 4, 1977. The government has included this in its own appendix at pp. 1-13 thereof.

the robbery of the Colvin-Eggert Branch of the Chase-Manhattan Bank in violation of Title 18, United States Code, Sections 2113(a), (b) and (d) (App. 55-56).

The co-defendant, Ferraro, moved pre-trial to suppress all the items of real evidence seized from his apartment at 886 Richmond Avenue, Buffalo, New York. That motion was ultimately denied. All those items of real evidence, namely, guns, money and various items of clothing were introduced against these appellants, each of whom conceded lack of standing.

All pre-trial matters having been concluded, trial commenced with the selection of a jury on October 12, 1976. Well into the trial and on October 29, 1975 both Barrett and Santana moved for a mistrial based upon an article in the morning paper (App. 9-10, Ex. 1). The Court denied that motion (T. 1050-1051).[2] After both sides rested, Barrett and Santana moved for directed verdicts of acquittal (T. 1164, 1167). The Court denied the motion of each (T. 1167, 1170).

On November 2, 1976, following summations, the Court charged the jury and it retired to deliberate at about 12:30 P.M. (C. 48).[3] At about 4:50 that afternoon the jury returned to the Court with a note asking it to explain the difference between a principal and an accessory (C. 50-52). The Court did so and sent the jury home for the night (C. 60). The following day at about 11:15 A.M. the Court received a two part note from the jury. The first portion indicated that, while they had reached a verdict on one defendant, they wished to know if they could change their vote (C. 62-63). The Court informed them that they could (App. 37). The other portion of the note

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[2] Reference to trial transcript.

[3] Reference to the separate transcript of the charge.

read, "an impasse has been reached on the other two because one juror is unwilling to convict on circumstantial evidence." (App. 38). The Court then recharged the jury on the law of circumstantial evidence (App. 44-50). Shortly thereafter the jury returned finding Santana guilty on all counts and Barrett guilty on Count II, the larceny charge (C. 80-81).

On December 16, 1976 each of the appellants was sentenced to the custody of the Attorney General for a period of ten years (S. 16, 18).[4] Each timely filed his notice of appeal from that sentence.

Statement of Facts

At about 8:30 in the morning of June 16, 1976, Buffalo Police Officer Angelo Cannizaro, who lives about two and one-half blocks from the Richmond Avenue apartment complex, noticed a strange 1976 Cadillac, white over blue, bearing New York State Registration Number EC881 parked in front of his house (T. 254-255, 646-650, Gov. Exs. 79 and 80). That vehicle was observed by Martin Dobler, a resident of the Joseph Drive apartment complex at about 11:30 that morning. He observed a male exit the car and run easterly toward the adjoining court of the apartment complex (T. 303-307, Gov. Ex. 73). About five minutes later he noticed that the vehicle left (T. 310).

At about the time Dobler made his observation, Carlton Gilmour, a resident of 31 Joseph Drive, the Court just east of Dobler's (T. 323-324), observed a green Pontiac Lemans bearing New York State Registration Number 455 EDQ back into a parking space immediately in front of his window (T. 325-327). He jotted down the make and license number of the

[4] Reference to separate transcript of sentencing.

vehicle on a piece of paper (Gov. Ex. 81). He observed a white male approximately 5'8" to 5'9" coming from the south side of his apartment on the run and get into the driver's side of that vehicle (T. 325-329). Within a few minutes three white males got out, one ran around the south side of his unit, the other two around the north side, heading in a westerly direction toward the adjacent court (Gov. Ex. 73).

The Cadillac was then seen in the Colvin-Eggert Plaza wherein the Chase-Manhattan Bank is located, at about 11:30 or 11:45 a.m. by an employee of a drug store who testified that she observed the vehicle parked to the rear of her store which is adjacent to the Youngman Highway (T. 240-243), a distance of approximately one and two-thirds miles from the Joseph Drive apartments (T. 797). Other witnesses observed that vehicle parked immediately in front of the bank entrance at about the time of the robbery (T. 194-195, 258-263, 270-271, 287-288, 345-348).

The robbery of that federally insured bank (T. 42) occurred at about 11:50 a.m. when three armed, masked white males made off with approximately $9,911.95 in bank loot (T. 45, 47, 53-54, 81-82, 97, 113, 201).

Immediately upon entering the bank, one of them shouted, "Everybody get down." (T. 225-226). Two of the robbers vaulted the teller's cage, one of whom took strapped currency from the teller's drawer as well as a money bag consisting of 40 rolls or $400 in quarters, 20 rolls or $100 in dimes, 30 rolls or $60 in nickels and 40 rolls or $20 in pennies (T. 50-51, 67, 681-683, Gov. Exs. 14 and 21). The other robber took money from teller Pamela Worley. She was having difficulty opening her cash drawer and was told to "Open it up or you are dead." (T. 229). At that point he displayed his weapon (Gov. Ex. 3) which made her fearful of being shot (T. 230-231). When the

Assistant Manager realized that the robbers had left, he immediately ran to the entrance and observed the blue Cadillac pulling away (T. 271, 274).

Bank personnel as well as several witnesses in the vicinity of the bank described the garments worn by the hold-up men, a laundry-type bag being carried by one of them and weapons brandished by each (T. 70-71, 93-95, 108, 115, 197, 226, 230-231, 258-263, 270-272, 278-280, 292, 342-343). The witnesses in the plaza area observed the men get into the Cadillac and watched as it pulled away at a high rate of speed, fishtailing out of the parking lot (T. 263, 287-288).

Sometime after his first observation, Mr. Dobler again saw the blue Cadillac pull into the same parking place below his window and observed two or three men get out, each of whom was approximately 5'8" to 5'9" in height, one of whom carried a white pillow case over his shoulder. He observed them run in the same direction toward the adjacent court of the apartment complex as the first man he had seen earlier that day (T. 310-312). He watched them until he lost sight of them and within moments he observed a dark car "zoom out" of that parking lot area (T. 313, 321).

Around noontime, Francis Mulvey, a Detective on the Town of Tonawanda Police force, was patroling the Youngman Highway when he received a report of the robbery and was alerted to look for a 1976 Cadillac bearing New York Registration Number ECC 881 (T. 367-370). He testified that at about 12:20 in the afternoon as he was proceeding east on Joseph Drive he spotted the vehicle (T. 372-373). He immediately began a neighborhood check and came across Carlton Gilmour who handed him the slip of paper containing the description and license number of the green Pontiac Lemans Gilmour observed earlier that day (T. 374-

375, Gov. Ex. 81). Mulvey determined that the car was registered to one Cheryl May of 886 Richmond Avenue, Buffalo, New York. He immediately proceeded there arriving at about 12:40 p.m. (T. 376). Immediately upon arriving he observed the green Pontiac parked immediately to the rear of the apartment with its lights on and wipers in an upright position (T. 377, Gov. Exs. 64, 65 and 66).

Meanwhile, the City of Buffalo police were given a pickup order on that Pontiac automobile (T. 381-382). Dominic Pace, one of the first Buffalo policemen to arrive on the scene, immediately radioed for back-up support (T. 382). The police then surrounded the building (T. 384) which consisted of four separate apartment units, namely, 882 to 888 Richmond Avenue (T. 387-388, Gov. Exs. 61 and 74). Officers rang the doorbell at both the front and rear entrance to 888 Richmond, "pounded" on the door and shouted, "Police, open-up" (T. 382-383, 477). One of them observed movement in the curtains in the upstairs bedroom of that apartment (T. 478). A neighbor also observed lights flashing on and off in that same upstairs window (T. 603). One of the officers who remained stationed to the rear of the apartment heard loud noises from within, "Like they were tearing the building down." (T. 462). When sufficient support arrived, a number of officers entered the apartment through the rear door (T. 385). As they entered the living room, they observed a .44 Magnum (Gov. Ex. 1) and rolled coin (Gov. Ex. 14) on the living room floor (T. 368, 414-415). The gun was fully loaded (T. 435, 442).

One of the officers entered a closet off the living room of that apartment, observed a pile of wet clothes on the floor (T. 416, 434-435). At about that time that officer heard a scream coming from outside. He immediately left unit 888 and ran to unit 882. The occupant of that apartment told him that there

was a man in her house with a gun (T. 436, 613-615). He and another officer then entered that unit and when they arrived at the top of the stairs heard scuffling noises coming from a bedroom closet. Officer Delano opened the door with his gun drawn and apprehended Santana (T. 437-439). The occupant, Ruth Isaccs, testified that Santana looked like the man she had just seen in her apartment (T. 617).

After taking Santana into custody, Officer Delano returned to the 886 unit and retrieved from the living room closet a .32 caliber automatic (T. 439-440, 454, Gov. Ex. 3), a gray mask (Gov. Ex. 5), a white mask (Gov. Ex. 6), a dark blue ski mask (Gov. Ex. 7), a green rain suit (Gov. Ex. 10), two gray sweat shirts (Gov. Exs. 9 and 11), a green poncho type raincoat (Gov. Ex. 8) and a pair of blue dungarees (Gov. Ex. 25, T. 440-441).

Meanwhile other police officers went upstairs where they observed a hole in the wall between the 886 and 888 units (T. 389, 465, 502-503, Gov. Ex. 67). Officers also observed on the bed top of No. 886 rolled coin (T. 397, 467-468, Gov. Ex. 21). One of them, Steve Evans, alerted other officers that other suspects had likely entered into No. 888 through the hole (T. 466). One of his fellow officers, Norbert Kupinski, obtained a key to No. 888 and went in with other officers (T. 502-503). As he and others entered the upstairs bedroom closet, they observed a crawl space leading to the attic. The cover was pushed back and there were dirt marks on the walls—fingerprints and footprints (T. 504-505). Kupinski then climbed up with his weapon drawn (T. 519) and shouted, "This is the police, come out, let me see your hands first." At the same time he shined his flashlight around the attic area. In so doing he spotted an individual standing against a fire wall that separates apartment units 882 and 884 from 886 and 888 (T.

506-507). He ordered that individual forward toward the crawl space where he searched and cuffed him. As he was doing that he spotted another individual behind the chimney adjacent to the fire wall (T. 508). He identified the first suspect that he apprehended as Michael Patrick Barrett and the other as Joseph Charles Ferraro (T. 509-510).

Police Officer William Bowen who had been aiding Kupinski in lowering Barrett and Ferraro through the crawl space (T. 45) then returned to No. 886 where he observed a large quantity of money in a bureau drawer in the upstairs bedroom. He then took into his possession approximately $3,200 in Federal Reserve Notes (T. 488-489), Gov. Exs. 15 and 18). He then searched the hall closet and found a loaded .32 caliber pistol (T. 490-491, Gov. Ex. 2). Another officer found an additional $92 in currency in that bureau drawer (T. 512-513, Gov. Ex. 20). Another officer picked up a white cloth laundry bag which was also on the bed top at 886 (T. 533, Gov. Ex. 12).

One of the officers who was up in the attic that afternoon observed a cement block wall separating units 882 and 884 from 888 and 886 and noticed an approximate 2' x 2' hole in that wall (T. 538). The maintenance man who went to the apartments the following day to effect repairs also noticed several blocks missing from the fire wall leaving an opening which he testified was approximately 2½' x 3' in size. He also found in the attic beneath some insulation a loaded .357 Magnum (T. 623-626, 638, Gov. Ex. 4). He also testified it is only the end apartment units, namely, 882 and 888 that have openings leading to the attic (T. 625). The lid to the attic over number 882 was also opened and there was, "dirt and soot all over the closet and clothes—everything was messy." (T. 618).

During the course of the trial, proof was also adduced showing that three latent lifts taken from the inside right hand door handle of the 1971 Pontiac (T. 668-669) were identical with the prints of Ferdinand Santana (T. 887). Other expert testimony was introduced which showed that hairs found on the dark blue ski mask (Gov. Ex. 7) and the gray mask (Gov. Ex. 5), were microscopically similar to the hair of Ferdinand Santana (T. 726-730).

Of the items recovered from 886 Richmond Avenue, the residence of Joseph Charles Ferraro, the rolled coin nearly matched in dollar amount and denominations with that prepared by Teller Natalie Rossini the morning of the robbery (T. 51, 67, 681-683, 483). Six $5 Federal Reserve Notes which was part of the loot recovered from the apartment was bait money (T. 63-64, Gov. Ex. 15). In addition, a large portion of the other currency recovered therefrom contained both a "Chase-Manhattan Bank" strap and bore the teller identification number of Miss Rossini (T. 68-70, Gov. Exs. 83-86).

Bank personnel as well as others in the vicinity of the bank who had an opportunity to see the robbers leave the bank and get into the Cadillac automobile described the various items of clothing worn by them and weapons carried by them. Those witnesses testified that the gray mask (T. 70-71, 262, Gov. Ex. 5), the white mask (T. 272, 278-279, Gov. Ex. 6), the dark blue ski mask (T. 70-71, 108, 342-343, Gov. Ex. 7), the poncho type rain coat (T. 108, 226, 232, Gov. Exs. 8 and 10), the gray sweat shirts (T. 70-71, 262, 291, Gov. Exs. 9 and 11), a white laundry-type bag (T. 115, 278-279, 292, Gov. Ex. 12), the blue dungarees (T. 93-95, Gov. Ex. 25) and various handguns (T. 93-95, 197, 230-231, 278, 342-343, Gov. Exs. 3 and 4) all looked like or were similar to the masks, sweat shirts, rain wear, bag and guns worn and utilized by the perpetrators of the bank robbery.

ARGUMENT

POINT I

The trial Court properly denied the appellants' motions for mistrial based upon adverse publicity.

The newspaper article (App. 9-10, Ex. 1) which precipitated the motions for mistrial was predicated upon interviews with a local F.B.I. agent and the United States Attorney. The article related to bank robberies in general and described similarities in the *modus operandi* of the culprits. The particular similarities noted in the suburban bank robberies and the accompanying photographs contained in the article were similar to the evidence presented at the trial of the instant case.

Counsel for Barrett and Santana alleged prosecutorial misconduct and prejudice such as to make a fair trial impossible (App. 11-13). Judge Curtin immediately summoned the United States Attorney (App. 16) and the F.B.I. agent (App. 29). The United States Attorney explained to the Court that he had received a phone call from a newspaper reporter about two days prior inquiring as to how his office treats bank robberies and the conviction rate on such charges (App. 25-26). He went on to say that he had no conversation with anyone from the F.B.I. regarding the article (App. 26). He further stated that neither he nor the F.B.I. went out and sought publicity regarding this trial (App. 34). The F.B.I. agent, Dennis Gibbs, also stated to the Court that it was the reporter who approached him and asked for a story on suburban bank robberies. He stated that he was further assured by the reporter that there would be no mention of the present trial (App. 33-34). The Court, although cautioning restraint in the granting of such interviews, was unable to find that the Bureau or

the United States Attorney's Office actively sought publicity in any way pertaining to this case (T. 1054-1055). See *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

Prior to proceeding with the trial, the judge summoned the jury and made inquiry as to whether anyone subscribed to the particular tabloid or had occasion to see the morning issue of the paper (T. 1039). Four jurors replied that they had seen the paper. The judge then sent the remaining jurors down to the jury room while he conducted a *voir dire* of each of the remaining four in chambers (T. 1040-1050). At the outset the judge made clear that his purpose was not to admonish them for having read the paper but only to ascertain whether they had read a certain article which, although having nothing to do with this particular law suit, addressed generally the topic of bank robberies. The judge concluded that none had read the article and that two of the jurors who had seen the photographs were in any way influenced or prejudiced in their ability to render a verdict based upon the evidence in the record (T. 1050).

Judge Curtin then reconvened the entire panel and gave the following instruction regarding the events:

> I want to emphasize again that I am not criticizing anyone for reading the paper because I did not tell you not to read the paper. I said, 'do not read any articles that may appear in the paper about this case.' The article that appeared had nothing to do with this case at all . . . certainly no one should consider this inquiry one way or another. Just forget about it and let us get on with the facts of this case (T. 1056).

The trial Court initially cautioned the jurors not to discuss the case or read or listen to publicity, but to decide guilt or innocence based upon the evidence in the case (T. 13-14). He

so cautioned them again prior to opening statements (T. 24). And prior to this motion for a mistrial, the Court gave similar cautionary instructions on no less than five other occasions (T. 206-207, 212-214, 256, 772, 1016).

In rendering his decision on co-defendant, Ferraro's, post conviction motion on this same ground, he said that: "Although one or two jurors admitted seeing the newspaper that day, no juror had read the particular article. The Court cannot accept the defendant's argument that 'it is naive to accept the jurors' statements [that they were not prejudiced] as being forthright'. The Court was satisfied at the time that none of the jurors saw the potentially prejudicial article, and, therefore, declined to declare a mistrial, the Court does not believe that the circumstances warrant a new trial at this time" (Gov. App. 6-7).

Last June the Supreme Court had an opportunity to trace the developments of the law in this area in the landmark decision of *The Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976). Although that case involved primarily the issue of the constitutionality of prior restraints on the press, an issue not raised here, the Court's discussion of the Sixth Amendment guarantee of "trial by an impartial jury" in Federal criminal prosecutions is illuminating. There the Court reviewed the major fair trial decisions from *Irvin v. Dowd*, 366 U.S. 717 (1961) through *Sheppard v. Maxwell, supra*. A review of those cases where reversal was necessary, reveals a pattern of pre-trial publicity such that "any subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality." *Rideau v. Louisiana*, 373 U.S. 723, 726 (1963).

In *Irvin v. Dowd, supra*, for example, the Court reversed a conviction for murder where there was intensive and hostile

news coverage wherein the local prosecutor and the police issued regular press releases. The articles carried headline stories announcing that the defendant had confessed to 6 murders and 24 burglaries. In addition, 8 of the 12 who ultimately served on the panel thought the defendant guilty, but indicated that they could still render an impartial verdict. Likewise, in *Marshall v. United States*, 360 U.S. 310 (1959) where there was a reversal of the petitioner's conviction for unlawfully dispensing drugs, four jurors read one or more newspaper articles stating that the defendant had been previously convicted for practicing medicine without a license.

In situations well beyond the facts of this case, appellate Courts have affirmed denials of mistrial motions. In *United States v. Solomon*, 422 F.2d 1110 (C.A. 7 1970), *cert. denied sub nom.; Sommer v. United States*, 399 U.S. 911, an article appeared during the course of the trial referring to the defendant as "a reputed crime syndicate loan shark" and referred to his relationships with others of similar background and reputation. Despite the fact that six jurors had read the article in total or in part, the trial judge *voir dired* each of them and satisfied himself that each of the jurors could render judgment based upon the evidence introduced at trial and not as a result of that article. The Court said, at 1119:

> The circumstance of the publicity involved in the present case also lacked many of the other features which have led courts to findings of prejudice per se. Only a single article reached any of the jurors. It was immediately brought to the attention of the district judge who interrogated the jurors and thereafter repeatedly admonished them to disregard newspaper publicity. He concluded that the jurors responded accurately as well as honestly when they indicated that they remained impartial and capable of rendering a fair verdict.

In *United States v. Daddano*, 432 F.2d 1119, 1127 (C.A. 7 1970), *cert. denied sub nom.* 401 U.S. 967, the Court came to the same conclusion despite some fifty separate articles which appeared in several different Chicago newspapers relating to the trial and were read by some of the jurors.

The procedure used in those cases of *voir diring* the affected jurors was approved in *Nebraska Free Press* as a means of protecting a defendant's Sixth Amendment rights. The Court said, at 602:

> In particular, the trial judge should employ the voir dire to probe fully into the effect of publicity. The judge should broadly explore such matters as to the extent to which prospective jurors had read particular news accounts or whether they had heard about incriminating data such as an alleged confession or statements by proportedly reliable sources concerning the defendants guilt.

The Court here followed this precise procedure and assured itself that there was no prejudice to either of the appellants. Furthermore, the article with which we are here concerned did not refer to the trial or any of the defendants at trial. In short, Barrett and Santana have failed to present any evidence to rebut the presumption that the jurors followed the judge's instructions and admonitions. *United States v. Brasce*, 516 F.2d 816 (C.A. 2 1975), *cert. denied* 423 U.S. 868 (1975). In such a situation where there is an absence of publicity which is so prejudicial that a mistrial is the only avenue open, the jury is presumed to be equal to the task of basing its verdict on the evidence in the record. *United States v. Persico*, 425 F.2d 1375 (C.A. 2 1970). Such is the situation here.

Judge Curtin's denial of the mistrial motions by these appellants was, in all respects, proper.

POINT II

The trial Court's re-charge on circumstantial evidence was proper.

The test to be applied as to whether a re-charge or supplemental charge to the jury is proper depends upon whether or not it is one that is coercive in effect. This situation normally arises where a jury reports it is deadlocked and the Court gives an "Allen" or "Dynamite" charge. See, *e.g.*, *United States v. Malizia*, 503 F.2d 578, 583 (C.A. 2 1974), *cert. denied* 420 U.S. 912. Even here, this type of charge has been repeatedly approved by this Circuit so long as the charge is properly formulated. Here, the note sent to the Court read, "An impasse has been reached . . . because one juror is unwilling to convict on circumstantial evidence" (App. 38). At this point, the judge informed counsel that he intended to treat this as a question and re-charge on circumstantial evidence (App. 37-38). Then, before making any explanation to the jury, the Court told them (App. 44):

> In the beginning in an attempt to answer your question I should again repeat to you that no man or woman should be convicted in a court unless the jury is convinced of guilt beyond a reasonable doubt.

And again, prior to answering the portion of the note which is in issue here, the Court said (App. 46):

> Again we start with the proposition that you cannot convict, you cannot vote to convict unless you are convinced of guilt beyond a reasonable doubt from the evidence in the case. That means all the evidence in the case, what the witnesses said. what the witnesses show and the interrelationship between one and the other.

The Court then went on to explain and instruct on the law of circumstantial evidence and concluded by telling them (App. 48-49):

> Certainly, as I have told you before, if there are two reasonable inferences that may be reached, both equal, one pointing to innocence and the other pointing to guilt, then, of course, you should adopt the inference that points to innocence rather than to guilt.
>
> Again, it is important that you listen to the conscientious views of your fellow jurors and give them your own well considered suggestions. You should not in any case consider material outside of the court room, but you should consider what you had heard here.

As the Court said in *United States v. Abbadessa*, 470 F.2d 1333, 1338 (C.A. 10 1972):

> In determining propriety of supplemental instructions, it must be considered as a whole along with the general charge previously given, and a single sentence is not to be looked out of context and considered separate and apart from the remainder.

In that narcotics case, an entrapment defense was interposed. The Court charged entrapment to the jury and re-charged on the law of entrapment on two additional occasions after the jury came back with requests for further instructions on that point, the last time being at a point when the jury revealed that it was experiencing difficulty in arriving at a verdict. After some time, the jury again came back and reported that it had been unable to agree. At that point the Court *sua sponte* gave its prior charge concerning entrapment together with other comments in the nature of a modified "Allen" charge. The Appellate Court found no prejudicial error in the giving of the final supplemental instructions under the circumstances.

Here, the Court re-charged but on one occasion and stayed far away from an "Allen" or modified "Allen-type" charge, far different from *Abbadessa*. Judge Curtin conscientiously

phrased the charge so that no juror felt coerced to abandon his personal conviction. See *United States v. Adcock*, 447 F.2d 1337, 1338 (C.A. 2 1971), *cert. denied*, 92 S.Ct. 278.

This was another issue the trial Court had occasion to consider in ruling on Ferraro's post-trial motions. The Court denied his motion in this respect finding his re-charge in all respects proper (Gov. App. 11-13). The appellee adopts his view.

POINT III

The evidence was sufficient to sustain the jury's verdict.

Barrett claims that the evidence adduced at trial was insufficient to sustain a jury verdict of guilty on Count II, the larceny charge, of the indictment. Of course, the standard to be applied here is, whether in viewing the evidence presented in the light most favorable to the government, a reasonable juror could fairly find the appellants guilty. *United States v. Falcone*, 544 F.2d 607, 610 (C.A. 2 1976) and cases cited therein.

To sustain a conviction under the count the government must prove that: the bank was a member of the Federal Deposit Insurance Corporation; the act of taking money exceeding $100 was without permission and with intent to deprive the owner; the money so taken belonged to or was in the care, custody, control, management or possession of the bank as charged; and the act was done willfully. See generally *United States v. Mason*, 440 F.2d 1293, *cert. denied* 400 U.S. 880.

The first element was satisfied when the parties stipulated to the admission of evidence of the FDIC Certificate (T. 42).

The money was money that was in the care, custody, control, management and possession of the bank (T. 80-81). The money taken was without permission and exceeded $100 and the jury could reasonably infer that the taking of the money was done willfully. The only question is whether Barrett was the perpetrator of the crime of larceny. In this regard, the jury is certainly permitted to draw reasonable inferences from the evidence. *United States v. Ragland*, 375 F.2d 471 (C.A. 2 1967).

The jury, in drawing reasonable inferences, could find that Barrett was one of the three individuals who drove to the bank in a 1976 Cadillac, robbed it, returned to the Joseph Drive apartment complex, switched to the green Pontiac, drove to Ferraro's apartment, went in and upon seeing or hearing the police went upstairs, chopped a hole in the wall, went into apartment 888 and hid in the attic until he was apprehended. While it is true that there is no direct evidence implicating Barrett, bait money and other identifiable bank loot were found in apartment No. 886 along with items of clothing and weapons that were identified as having been utilized in the commission of the robbery. Under these circumstances, the jury could fairly conclude beyond a reasonable doubt that Barrett was one of the perpetrators of the bank robbery.

Conclusion.

In considering the entire record, there was sufficient evidence to support the jury's verdict of guilty. Both Barrett and Santana were accorded a fair trial under all the circumstances. The judgment appealed from should, therefore, be affirmed.

Respectfully submitted,

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Roger P. Williams,
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AFFIDAVIT OF SERVICE BY MAIL

Re: USA vs. Michael P. Barrett
& Ferdinand Santana

State of New York)
County of Genesee) ss.:
City of Batavia)

~~77-1082~~
77-1018

I, Leslie R. Johnson being duly sworn, say: I am over eighteen years of age and an employee of the Batavia Times Publishing Company, Batavia, New York.

On the 13th day of April, 19 77 I mailed ____ copies of a printed Brs. & App. in the above case, in a sealed, postpaid wrapper, to:

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Clerk U. S. Court of Appeals-2nd Circuit
New Federal Court House
Foley Square
New York, N.Y. 10007

2 Copies of each to Richard Brownstein Esq.
427 Brisbane Bldg.
Buffalo, N.Y. 14203

2 Copies of each to Salten Rosenberg Esq.
400 Walbridge Bldg.
Buffalo, N.Y. 14202

at the First Class Post Office in Batavia, New York. The package was mailed Special Delivery at about 4:00 P.M. on said date at the request of:

Richard J. Arcara Esq., U. S. Attorney, 502 U. S. Courthouse

Buffalo, NY 14202, Att: Roger P. Williams Esq., Asst. U. S. Attorney

Leslie R. Johnson

Sworn to before me this
13th day of April, 19 77

Patricia A. Lacey

PATRICIA A. LACEY
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 19 77